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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re S.R. et al., Persons Coming Under the
Juvenile Court Law.

SOLANO COUNTY HEALTH AND
SOCIAL SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

MARIE D.,

Defendant and Appellant.

A134087

(Solano County
Super. Ct. Nos. J40868 & J40869)

Appellant Marie D. (Mother) appeals from two juvenile court disposition orders, which (1) determined that Mother's two children (collectively Minors), A.W. (Baby) and S.R. (Daughter), should not be returned to her custody; (2) authorized respondent Solano County Health and Social Services Department (the Department) to place Daughter with a relative or in a foster home, with reunification services to be provided to Mother and to Daughter's father, Joseph R.; and (3) placed Baby with his biological and presumed father, Derrick H., while denying reunification services to Mother. Mother contends there was insufficient evidence to support the juvenile court's finding that Minors should not be returned to her custody, and, alternatively, that there was insufficient evidence to justify the denial of reunification services to Mother with respect to Baby. We disagree with both of these contentions, and therefore affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Detention of Minors

In May 2011, Mother, Daughter, and Baby were living in Vallejo with Mother's boyfriend, Joseph W. (Boyfriend), who was on parole for attempted car theft. Daughter was three years old, and Baby was a one-month-old infant. Daughter had an enlarged head and a history of seizures, was not yet able to talk, and was in a special education preschool.¹

On May 20, 2011,² Baby was taken to a hospital emergency room in Vallejo because he was lethargic and gasping for air. He was subsequently airlifted to Oakland Children's Hospital (Children's), where he was diagnosed with multiple non-accidental injuries consistent with child abuse and shaken baby syndrome. The Vallejo police placed Minors in protective custody and commenced a criminal investigation, while a social worker from the Department went to Children's to speak with Mother and Boyfriend. Daughter was taken to a temporary foster home.

The Department interviewed Mother and Boyfriend at Children's. Boyfriend said he was not the biological father of either child, but he had been living with Mother since before Baby was born; believed Mother's statement that she had named him as Baby's father on the birth certificate; had cared for Baby and held him out as his own; and appeared to be very bonded with him. Mother believed that Daughter's biological father was Joseph R., and Baby's biological father was Derrick H. Mother reported that Joseph R. had not seen Daughter for two years, had a serious alcohol problem, and was not paying child support. Mother was not in touch with Derrick H. When the Department later contacted Joseph R. and Derrick H., each man requested paternity testing. Joseph R. knew of Daughter's existence but questioned his paternity; Derrick H. had only recently learned of Baby's existence.

¹ Daughter was later diagnosed as having a genetic condition associated with language delay, learning difficulties, and physical difficulties, to varying degrees in different people.

² All further references to dates are to the year 2011 unless otherwise noted.

Boyfriend initially denied harming Baby. He said Baby's injuries were due to Baby's having fallen off a bed, even though a doctor had already informed Boyfriend the injuries were not accidental and could not have been caused by such a fall. Boyfriend said he realized, looking back, that Baby had been acting unusually for about a week before he was taken to the emergency room. Both Mother and Boyfriend indicated that no one other than the two of them was involved in caring for Minors.

Mother was depressed and unresponsive when interviewed at the Hospital. She had a history of alcohol abuse and mental illness. On May 22, she sent several text messages to a Vallejo police officer with whom she had spoken earlier, first telling him she was "going to have a nervous breakdown any minute," then stating "it is time to drink now," and finally saying "got to end this life." At that point, the officer picked Mother up from Children's and took her to a psychiatric hospital.

B. Dependency Petition and Ensuing Events

On May 24, the Department filed a dependency petition alleging that: (1) Baby had suffered serious non-accidental harm inflicted by Mother and/or Boyfriend, placing Minors at substantial risk of physical and emotional harm (Welf. & Inst. Code, § 300, subd. (a)³); (2) Mother and Boyfriend had failed to protect Baby by injuring him and by failing to seek medical care for him promptly after he showed signs of requiring medical attention, and Mother had mental health issues, including clinical depression, that impaired her ability to care for Minors (§ 300, subd. (b)); (3) Baby, a child under the age of five, had suffered severe physical abuse by a parent or caregiver, and Mother and Boyfriend knew or should have known of the abuse (§ 300, subd. (e)); (4) Daughter's and Baby's respective alleged (biological) fathers had not regularly provided for their care, custody, and support, and were unable or unwilling to do so (§ 300, subd. (g)); and (5) as to Daughter, she was at risk of abuse or neglect due to the severe injuries Baby had suffered while in the care of Mother and Boyfriend (§ 300, subd. (j)).

³ All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

Boyfriend left California soon after Baby was hospitalized, and his whereabouts were unknown for some time. During this time, Boyfriend had telephone conversations and text message exchanges with Mother's younger sister and with a female cousin of his. He informed both women that he had shaken Baby three times, and that he had felt Baby's rib crack while he was shaking him. Boyfriend was very remorseful. He told both women that Mother was not there when he shook Baby.

Boyfriend eventually confessed to the police that he was responsible for Baby's injuries, but continued to maintain that Mother had no knowledge of what he did. However, Mother told a police officer and a social worker that about two weeks before Baby was hospitalized, she heard a cracking noise while Boyfriend was handling Baby. Mother said she did not confront Boyfriend when this happened because she was afraid he would hit her, due to his history of violently hitting inanimate objects when angry or upset. Mother explained that she did not seek medical attention because Baby did not appear to have been harmed. Mother contended she never left Baby alone with Boyfriend after that, but this was inconsistent with other statements she and Boyfriend made to the social worker, which indicated that Mother left Baby alone with Boyfriend for brief periods such as while she showered.

By June 20, Baby's condition had stabilized sufficiently to permit him to be released from Children's and placed in a foster home. However, he was suffering from physical disabilities that could be permanent, and would require ongoing treatment. In July, a doctor at Children's told a Department social worker that given the nature of Baby's injuries, Mother and Boyfriend would not necessarily have realized, based on Baby's behavior before the incident leading to his hospitalization, that Baby had been hurt severely enough to require medical attention.

In early July, Boyfriend was located in Minnesota and extradited back to California on charges of inflicting great bodily injury on a child. After his return, Boyfriend filed a statement indicating that he believed he was Baby's parent, and stating that even if the court found he was not, he wanted to be part of Baby's life.

C. Jurisdictional Hearing and Rulings

On July 20, the juvenile court set a contested jurisdictional hearing for August 29. The court also gave the Department's social worker discretion to expand Mother's visitation and to change Baby's placement. After the hearing, Daughter was placed with Mother's mother (Grandmother) and father (collectively Grandparents). Because Grandparents had physical limitations and difficulty driving long distances, the Department decided not to place Baby with them. On July 21, the Department informed the court that genetic testing had confirmed Joseph R. as Daughter's biological father, and asked the court to make a paternity finding based on the test results.

At the jurisdictional hearing on August 29, the Department orally amended the petition, dismissing some of the allegations as to Mother.⁴ The parties stipulated that Baby had suffered specified injuries; that Baby was in the custody of Mother and Boyfriend when the injuries were sustained; and that the injuries were "severe and would not normally have been sustained except through the infliction of non-accidental trauma or other unreasonable acts."

A Vallejo police officer reported that Boyfriend admitted shaking Baby violently on more than one occasion. After interviewing Boyfriend, the officer told the Department's social worker Boyfriend gave no indication Mother knew he had shaken or injured Baby. Both the officer and the social worker, however, testified that Mother admitted hearing a cracking noise while Boyfriend was handling Baby, but did not confront Boyfriend because she was afraid of him.⁵ Mother was inconsistent in her accounts of when this occurred, but it was at least a few days before Baby was hospitalized, and perhaps as long as two weeks.

Mother also admitted to the social worker that she had not sought immediate medical attention for Baby, and was inconsistent in her account of Baby's behavior during the days before he was taken to the hospital. The social worker acknowledged

⁴ On November 29, the Department filed an amended petition that included only those allegations sustained by the juvenile court.

⁵ Mother also admitted these facts in her testimony at the hearing.

that according to a doctor at Children's, Baby's behavior after his injuries would not necessarily have alerted his caregivers that he needed immediate medical attention. Nonetheless, the social worker opined that Mother should reasonably have known that Baby was injured or at risk of being injured, and that Mother did not take responsibility for Baby's injuries, or for putting her children at risk from the men with whom Mother had relationships. Because Mother did not appear to be capable of protecting her children or putting their safety first, the social worker believed Minors would be at risk if returned to Mother's custody. The social worker acknowledged, however, that Mother had expressed concern about Minors since they were detained, had behaved appropriately with them during visits, and had indicated interest in taking a parenting class and a class on caring for medically fragile babies.

At the same hearing, Derrick H. testified that he had had a two-month sexual relationship with Mother starting in about May 2010. After the relationship ended, Mother told him she was pregnant, but she said she had gotten an abortion, and he believed her. After that, Derrick H. was not in communication with Mother, and did not receive any further information about her until about a month before the Department social worker first called him about Baby's injuries. At that time, his brother told him Mother had given birth to a child that might be his, but Derrick H. did not contact Mother to ask if Baby was his child. Once Derrick H. learned this might be the case, he agreed that if a paternity test showed he was in fact Baby's father, he would be responsible for him.

At the hearing on August 29, the juvenile court noted that Joseph R. had already been found in another proceeding to be Daughter's biological father,⁶ and deferred ruling on Boyfriend's and Derrick H.'s requests for presumed father status as to Baby. At the conclusion of the hearing, the court gave the Department social worker discretion to

⁶ The Department filed a report later in the proceedings indicating that an action to establish Joseph R.'s parental relationship to Daughter was filed by "DCSS" (presumably the Department of Child Support Services) on May 4, and a default judgment was entered on August 1.

increase visitation, took the remaining issues in the case under submission, and scheduled a further hearing for September 7.

At the hearing on September 7, the court informed the parties that the allegations of the petition, as amended at the prior hearing, were sustained. These allegations were: (1) while in the care and custody of Mother and Boyfriend, Baby suffered severe injuries that would not normally have occurred in the absence of non-accidental trauma; (2) the actions of Mother and Boyfriend placed both Minors at substantial risk of physical and emotional harm; and (3) Mother had a history of mental illness, including clinical depression, that periodically impaired her ability to provide for the care, custody, and supervision of Minors. The court set a disposition hearing, as well as a hearing on paternity as to Baby, for October 19, and in the interim, gave the Department discretion to place Daughter with her biological father, Joseph R., upon five days' notice to counsel.

Genetic testing confirmed that that Derrick H. was Baby's biological father. Accordingly, the juvenile court ruled that Derrick H. was Baby's legal and natural father. On October 19, the disposition hearing was continued to November 9.

D. Disposition Report

On November 2, the Department filed a disposition report (the Disposition Report). As of that date, Daughter was with Grandparents, where she had been since August 16, and Baby was in the same foster home where he had been placed upon his discharge from Children's on June 20. On the issue of paternity, the Disposition Report noted: (1) Joseph R. had been found to be Daughter's biological father and was requesting presumed father status; (2) Derrick H. had been found to be Baby's biological father and was requesting presumed father status; and (3) Boyfriend admittedly was not Baby's biological father, but had supported Mother through her pregnancy, held Baby out to be his own, and considered Baby his son, and was requesting presumed father status.

1. Mother

The Disposition Report disclosed that in May 2009, Mother was reported to the Department because, while Mother was withdrawing from alcohol and had been placed on a psychiatric hold, she held Daughter too tightly and squeezed her. No dependency

proceedings were initiated at the time, and this was Mother's only prior child welfare referral. Mother also had a history of arrest for minor offenses and probation violations, many of which were alcohol-related. Mother was molested by an uncle when she was a young girl, but had been helped by participating in therapy. After graduating from high school, she lived with her parents and worked at a fast food restaurant, where she met Boyfriend.

As of the date of the Disposition Report, Mother was living with her younger sister, who had just had a baby, and hoped to study pediatric nursing at the local community college. The Department social worker opined that Mother was bonded to Minors, had been cooperative with the Department, was a hard worker, and had the support of her extended family and friends. Mother told the Department social worker that she was eager to have Minors returned to her custody, and believed that she was in a position to care for them. Mother's family members were available to provide child care while Mother was at work.

Mother was agreeable to supportive services including mental health treatment, psychiatric treatment, medication monitoring, substance abuse treatment and support, and parenting education. She was seeing a primary care physician who had prescribed psychotropic medication for Mother's depression, which she had been taking for a month and felt had been of benefit. She was also attending a weekly therapeutic support group. Mother had complied with requested drug testing, which was negative for all the substances tested. She had also completed a parent education class.

Mother was engaging in supervised visitation with both Minors on a regular basis. She saw Daughter about twice a week, and wanted to see her more often but was prevented from doing so by her work schedule. The Department social worker encouraged her to visit, as Daughter was placed Grandparents, who lived in the same city, and there were no reported concerns about Mother's contact with Daughter. Mother's visits with Baby took place under the supervision of the Department. She interacted well with Baby, held him and exercised his muscles, and was always appropriate during the visits. Mother had been encouraged to attend Baby's occupational

therapy and medical appointments, but had not yet been able to do so for practical reasons.

Mother had been actively participating in a substance abuse recovery program. When she became ineligible for that program, she took the initiative to contact the social worker for referrals to other agencies. In an interview on October 11, the social worker confronted Mother with the fact that Mother's chemical dependency counselor had told the social worker about a recent relapse. Mother had voluntarily disclosed the relapse to the counselor, attributing it to conflict with roommates about finances. Mother admitted to the social worker that she had experienced the urge to relapse, but explained that due to the low alcohol content of the wine cooler she consumed, she did not consider it a relapse.

Mother's therapist at Kaiser reported that Mother had been attending weekly outpatient groups regularly and had "really turned it around" in the last two and a half months. The therapist was aware of Mother's alcohol relapse, which Mother had reported to her, but did not know whether or not it was a one-time incident. Mother had sought out chemical dependency treatment and had a goal of seeking a sponsor for additional support. When asked about mother's history of dysfunctional and abusive relationships, and her unwillingness to take more than minimal responsibility for Baby's injuries, the therapist responded that Mother was "very concrete and does lack insight," but opined that her tendency to excuse Boyfriend's actions had "improved some" in the course of her participation in the outpatient group. The therapist and the social worker agreed that Mother was receiving sufficient services for the time being, but would benefit from individual therapy once she had completed some of her other programs. Unfortunately, shortly after the social worker interviewed the therapist, Mother lost her health coverage and became ineligible to receive further services through Kaiser.

Mother had concerns about placing Minors in the custody of their respective biological fathers. She was concerned about Joseph R.'s recent arrest for driving under the influence of alcohol, and told the social worker that Joseph R. had a drinking problem that she believed would interfere with his ability to supervise Daughter. Mother also

disclosed that during her relationship with Joseph R., he had behaved aggressively when he drank, and had given her a black eye on one occasion. She was also concerned about giving Derrick H. custody of Baby, in light of his having wanted Mother to terminate her pregnancy, as well as his unwillingness to grant Mother a role in Baby's life, and his tendency to become angry when he drank. As to Boyfriend, Mother did not want him to be part of Baby's life at all, and had refused his attempts to call her from jail.

2. Joseph R. (Daughter's Biological Father)

Joseph R. was born into a well-off family in El Salvador, but moved to the United States at the age of six. He had worked as an automobile mechanic since graduating from high school, though he had recently been laid off. He owned his own home, and had two adult daughters from a prior relationship whom he co-parented and with whom he was close.

The Department social worker indicated that Joseph R. was cooperative with the Department, welcomed the social worker when she visited his home, and had developed a positive relationship with Daughter. Joseph R. was participating in weekly supervised visits with Daughter. These had gone well, with both parties appearing to enjoy their time together.

Joseph R. was initially unsure he would be able to care for Daughter because of the financial issues resulting from his unemployment. Eventually, he told the social worker that he could take custody of Daughter, and would prefer that over her placement with Mother or Grandparents, who he believed were giving Mother unlimited access to Daughter.

Joseph R.'s record, as summarized in the Disposition Report, included one conviction and one pending criminal case for driving under the influence of alcohol. Joseph R. was also arrested in 2008 for domestic battery, but the victim (who was not Mother) declined to prosecute. During an unannounced visit, the social worker observed numerous empty alcoholic beverage containers in Joseph R.'s home. When the social worker told Joseph R. that he appeared to have a substance abuse problem with alcohol,

he agreed to follow her recommendations to obtain a substance abuse assessment, comply with alcohol testing, and begin attending 12-step meetings.

3. Derrick H. (Baby's Biological Father)

With regard to Derrick H., the Disposition Report indicated that he had been the subject of a child abuse report in San Diego County in December 2009. The report was made because one of his two children from another relationship had bruises on his legs after a visit with Derrick H., and Derrick H. was living with someone who was using methamphetamines. In addition, Derrick H. told the Department social worker that he had been convicted of driving under the influence of alcohol 16 years earlier, and arrested but not prosecuted for possession a small amount of marijuana 5 years earlier.

Derrick H. had worked as a plumber and carpenter, but was currently unemployed. He was receiving unemployment benefits, and living in a trailer that he owned, which was also occupied by his nephew's girlfriend and her toddler son. He had family nearby, and a girlfriend who lived near Sacramento. Derrick H.'s two children from his other relationship lived in Southern California with their mother, but spent their school vacations with Derrick H., and had bedrooms of their own in his home.

Derrick H. was cooperative with the Department, had the support of his extended family and friends, believed he had basic parenting skills due to his relationship with his older children. He was "motivated to start a relationship" with Baby, though he and his family were concerned that there were "so many unknowns as to [Baby's] prognosis for recovery and possible permanent disability." He agreed to engage in supervised visitation with Baby and to start attending Baby's occupational therapy and pediatric appointments. The first such visit went well. Derrick H. was interested in receiving parenting education and support in light of Baby's specialized needs, and believed that the best place for Baby was in his home.

Derrick H. told the social worker he believed Mother could probably benefit from services addressing her mental health issues. He was supportive of Mother having supervised visitation with Baby, but was concerned that even with additional services for Mother, Baby would be at risk of abuse or neglect in her custody.

4. Boyfriend (Baby's Nonbiological Alleged Father)

Boyfriend was in jail at the time the Disposition Report was prepared, as he had been on probation for an auto theft in Nevada at the time Baby was hospitalized, and was in the process of being extradited to Nevada to be prosecuted for probation violation. He had a history of committing arson, for which he had been at a youth facility and on probation as a juvenile, but he denied that this was a current issue for him.

Boyfriend appeared to be remorseful about his actions towards Baby, and wanted the court to do what was in Baby's and Daughter's best interest. He was cooperative with the Department social worker, was agreeable to participating in services, and was currently participating in an anger management program and Bible study at the jail. Boyfriend expressed love for Baby and a desire to be part of his life through visitation and, eventually, financial support. He was concerned about Mother's ability to care for Baby, because she often seemed "spaced out" when she took care of Baby during their relationship, even though he was not aware that she had consumed any alcohol at the time.

5. Recommendations

The Disposition Report recommended that Minors be declared dependents, and that reunification services be provided to Mother, Joseph R., and Derrick H., but not Boyfriend. The social worker believed that Minors would be at significant risk of continued abuse and/or neglect if returned to Mother's custody, because her failure to protect Baby from Boyfriend's physical abuse remained of concern. Mother appeared to lack insight as to her own partial responsibility for the dependency proceedings due to her failure to intervene to protect her children. Given this lack of insight, as well as Mother's alcohol relapse and her minimizing of it, the social worker believed that the risks to Minors had not been sufficiently addressed or mitigated to assure their safety if they were returned to Mother. Mother's history with alcohol and depression made it extremely important that she continue to actively engage in treatment, and demonstrate a consistent period of sobriety, before consideration could be given to returning Minors to her custody.

Because of the relapse, the Department did not recommend that Mother be granted unsupervised visitation until she had demonstrated a consistent period of sobriety. However, despite the seriousness of Baby's injuries and Mother's failure to intervene, the Department still recommended that Mother be given the opportunity to participate in reunification services. Mother had a strong bond with both children, and had actively sought out and participated in supportive services. The Department was optimistic that Mother's failure to demonstrate a protective capacity could be successfully addressed with recommended services.

The Department recommended that Daughter not be placed with Joseph R. for the time being, because of the concern that he had an unaddressed substance abuse problem which he did not acknowledge. At the time the disposition report was prepared, Joseph R. had not yet complied with the Department's recommendations that he obtain a substance abuse assessment and drug testing. In addition, Joseph R. himself was hesitant to become Daughter's primary parent due to his current personal circumstances. The Department recommended that Joseph R.'s visitations with Daughter remain supervised because of his alcohol issues.

As to Baby, the Department had concerns about placing him with Derrick H., largely because of Baby's needs for specialized care and for regular interaction to encourage his development. The Department recommended that Derrick H. be granted supervised visitation while Derrick H. became better acquainted with Baby and his specialized needs, with unsupervised and then overnight visitation remaining as possibilities based on the Department assessment of Derrick H.'s need for continued supervision. It also recommended that Derrick H. attend several appointments with Baby's service providers, so that the Department could assess Derrick H.'s willingness and ability to care for Baby safely and consistently.

Boyfriend was still in jail, and therefore unable to care for Baby. In addition, he was the one responsible for Baby's injuries. The Department opposed placement of Baby with Boyfriend, as this would put Baby at significant risk of continued abuse and neglect. The Department also opposed any visitation between Baby and Boyfriend, and did not

recommend that Boyfriend be given reunification services due to the unlikelihood that Boyfriend would be able to successfully address the issues leading to Baby's dependency within six months.

The Department considered the possibility of placing Baby with Grandparents, but decided to recommend against it. There were no indications that Baby would be at risk in their care, but their limited means of transportation would preclude them from ensuring that Baby received all of the medical and developmental care he needed.

E. Disposition Hearing

At the hearing on November 9, the parties requested a contested hearing on certain issues, which was set for November 30. On the date of the hearing, Grandmother filed a report indicating that Daughter was doing well and Mother was showing improvement. Grandmother recommended that Mother be permitted to have unsupervised visits with her once a week on a trial basis. At the November 9 hearing, the juvenile court gave the Department discretion to permit unsupervised daytime visits between Mother and Minors, and between Derrick H. and Baby. No overnight visits or placements were authorized, however.

On November 29, Mother was accepted into a dependency drug court program. On November 30, the Department filed an addendum (the Addendum) to the disposition report, which the juvenile court judge reviewed prior to the hearing later that day. The Addendum stated that Derrick H. had been permitted to have unsupervised visits with Baby for three hours twice a week, plus a longer visit on Thanksgiving Day. Derrick H. had also attended Baby's medical appointments, at which he was reported to have been focused and to have asked appropriate questions. Derrick H. understood that Baby would probably require specialized services and have special needs throughout his life, and nonetheless still had a commitment and desire to care for Baby.

The Department recommended in the Addendum that Baby be placed with Derrick H. Nonetheless, it recommended that the dependency case be kept open as to Baby, rather than simply placing him with Derrick H., so that family maintenance services and continuing oversight could be provided to support the family, particularly in

light of Derrick H.'s contentious relationship with Mother. If this recommendation were followed by the juvenile court, the Department also recommended that Mother not receive further reunification services, but be entitled at most to supervised visitation, due to the inability of Mother and Derrick H. to work together amicably, and due to the Department's view that Mother lacked the understanding and insight needed to care for and protect a child with Baby's specialized needs. Finally, the Addendum recommended that Daughter continue to be detained out of the custody of her parents, with reunification services to be provided to both Joseph R. and Mother.

At the hearing, the social worker who prepared the Disposition Report and the Addendum testified for the Department. Her testimony as to Daughter essentially reiterated the recommendations and reasons set forth in those documents. She remained concerned that Joseph R. did not believe he had an issue with alcohol, when in her opinion, he did. When cross-examined by Joseph R.'s counsel, she acknowledged that Joseph R. had told her he was not sure he could arrange for a substance abuse test because he was actively looking for work, and picking up whatever work he could get to make money. She understood that Joseph R. had started attending AA meetings, though she had not yet received a copy of his attendance sheet. She also acknowledged that Joseph R. had expressed concern for Daughter and her safety from the outset, and had maintained regular visitation with her. During the visits, Daughter quickly warmed up to Joseph R., who had brought coloring books and crayons with him, and the visits had consistently been appropriate and positive.

With regard to Baby, the social worker testified that although his medical condition had improved, he was still considered medically fragile, and was expected to have permanent disabilities, though the extent of them was not yet known. The social worker opined that the quality of Mother's regular visits with Baby was "very good." She fed Baby, changed his diapers, successfully soothed him when he became fussy, and was appropriately affectionate with him. Mother asked the social worker appropriate questions about how to care for Baby in light of his injuries and his medical situation. Mother had participated in two or three of Baby's occupational therapy appointments,

though she was unable to attend others. The occupational therapist reported some concern that during these sessions, Mother was more focused on cuddling with Baby and doting on him than she was with his therapy. In contrast, the therapist's report about Derrick H.'s participation in the sessions was "very positive."

The social worker had received very positive reports of Mother's visits with Daughter, which were continuing to occur under the supervision of Grandparents. Grandparents had requested that Mother be permitted to have unsupervised visits with Daughter in public settings like a park. The social worker had also learned that before Minors were detained, Mother had enrolled Daughter in a Head Start program on the recommendation of an infant specialist and early intervention teacher, and had arranged for Daughter to participate in speech therapy and a weekly play group for toddlers. The infant specialist told the social worker that she supported Daughter's being placed with Mother.

The social worker reported that Mother had been generally cooperative with the Department; had complied with her request for substance abuse testing; was participating in dependency drug court; and was compliant with regard to her substance abuse treatment, except for the alcohol relapse in September discussed *ante*. Mother also had a job and stable housing. Nonetheless, the social worker was concerned that there would be a risk to Baby if he were returned to Mother's care.

Her reasons for this concern were: (1) Mother lacked insight and understanding as to how she had contributed to the need for the dependency proceedings by failing to protect Baby even though she knew he as at risk of abuse in Boyfriend's care. (2) Mother had an alcohol relapse in September, which Mother had not disclosed directly to the social worker, although she had "self-reported" it to her recovery program, and had minimized when confronted about it. This caused the social worker to question how much progress Mother had made in treatment. (3) Because Mother lost her Kaiser coverage, which the social worker acknowledged was not Mother's fault, her access to services had been interrupted, thus increasing Mother's risk of a relapse. (4) Mother did not attend all of the therapy appointments for Baby to which she was invited (though this

was partly due to her work schedule), and her behavior at the appointments she did attend, in that she treated them more as bonding visits than as opportunities to learn about the care Baby needed and to report on his condition to the professionals responsible for his treatment. On cross-examination by Derrick H.'s counsel, the social worker acknowledged that she was also concerned that Mother had not yet addressed her mental health issues in a way that adequately prepared her to care for Minors independently.

The social worker also explained the basis for the Department's recommendation that Mother not receive reunification services with respect to Baby. She indicated that because the Department was recommending that custody of Baby be given to Derrick H., the Department wanted to support Derrick H. with family maintenance services so that this plan would succeed. She explained that because the Department planned to provide family maintenance services to Derrick H., it was not required to offer reunification services to Mother.

Finally, as to the contested paternity issue, the social worker recommended that Derrick H. rather than Boyfriend should be deemed Baby's presumed father. Since receiving confirmation that he was in fact Baby's biological father, Derrick H. had made efforts to establish and maintain a relationship with Baby, and was committed to the child. Boyfriend, on the other hand, was responsible for Baby's injuries, and could not currently care for him due to his incarceration.

At the conclusion of the hearing, the court found that Joseph R. was Daughter's presumed father; that both parents should receive reunification services, and that it would be detrimental to Daughter to be returned to either parent as of the time of the hearing. The court also declined to authorize immediate unsupervised visitation with Daughter for either parent, but gave the Department discretion to permit unsupervised visits in the future. In Joseph R.'s case, this authority was granted subject to Joseph R. taking steps to deal with his alcohol issues.

The court found that Derrick H. was Baby's presumed father, and authorized Baby's last name to be changed to reflect that fact. Because Derrick H. was Baby's nonoffending, noncustodial parent, the court agreed that Baby should be placed with him,

with family maintenance services, subject to a review in three months. The court granted the Department's request to bypass reunification services as to Boyfriend, and dismissed him from the case.

The court characterized the question of continuing reunification services for Mother with respect to Baby as "difficult," but noted that the Department was not required to provide such services to her given that Derrick H. would have custody and would be receiving services. The court also noted that Baby had sustained life-threatening injuries in Mother's care, and that Mother had been placed on a mental health hold at the time this occurred. For these reasons, Baby could not be placed with Mother immediately, and the court did not "believe anything would change with six months of services to . . . [M]other based on those facts." However, the court noted that some of the services Mother would have received in connection with Daughter's dependency would be the same as those she would have received with respect to Baby. Moreover, it was undisputed that Baby was bonded to Mother, and the court opined that mother should continue to be part of Baby's life to the extent of attending medical appointments and participating in visitation.

After some discussion, the court denied Mother family reunification services. However, with the agreement of counsel for Mother, the Department, and Derrick H., the court ordered that Mother would have the right to attend all of Baby's medical appointments, that Derrick H. was to give her reasonable advance notice of such appointments, and that Mother would have supervised visitation with Baby once a week, in addition to any medical appointments.

Mother, Boyfriend, and Joseph R. all filed notices of appeal. However, appellate counsel for Boyfriend and Joseph R. filed statements finding no appealable issues, and neither Boyfriend nor Joseph R. filed a pro se brief. Accordingly, we review the juvenile court's order in light of the briefs filed by Mother and the Department.

II. DISCUSSION

A. Removal of Minors from Mother's Custody

1. *Applicable Law and Standard of Review*

In dependency proceedings, if a minor is not returned to the original custodial parent's home at the dispositional phase, the child welfare agency's burden of proof is substantially greater than it was for the initial removal from the home at the jurisdictional phase. The agency now must show by clear and convincing evidence that removal is warranted by one of the circumstances listed in section 361, subdivisions (c)(1) through (c)(5).⁷ This heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children. Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 694-695.)

The provision relevant here is section 361, subdivision (c)(1), which requires the juvenile court to find that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (§ 361, subd. (c)(1); see *In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288 [isolated incident of corporal punishment, and parents' strict views on discipline, did not justify removal of teenager from parents' home].) The court may consider past events in determining whether there is a danger to the minor, and need not wait until the minor is seriously abused or injured to assume jurisdiction and take steps necessary to protect the minor. (*In re N.M.* (2011) 197 Cal.App.4th 159, 165 [where parent had not grasped danger of incident in which parent almost ran over child's foot while driving, and was in denial regarding reported incidents of physical abuse, substantial evidence

⁷ Section 361, subdivision (c) includes an additional subdivision (6), regarding Indian children. This provision is not reflected in our discussion, because the juvenile court found that neither Daughter nor Baby was an Indian child, and no party has appealed from those findings.

supported juvenile court's decision to remove minor from parent's custody]; cf. *In re Henry V.* (2004) 119 Cal.App.4th 522, 529 [single isolated instance of physical abuse did not justify continued out-of-home placement, where mother was cooperative and had completed parenting class, and in-home supervision would be adequate to address remaining issues].)

When a parent appeals from a finding that continued detention is supported by clear and convincing evidence, we review the record in the light most favorable to the juvenile court's order to determine whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings based on the clear and convincing evidence standard. (*In re Isayah C.*, *supra*, 118 Cal.App.4th at pp. 694-695; accord, *In re Henry V.*, *supra*, 119 Cal.App.4th at pp. 528-529.) In other words, while the juvenile court must base its findings on clear and convincing evidence, our role is limited to determining whether substantial evidence supports the juvenile court's conclusion that clear and convincing evidence exists.

2. Sufficiency of Evidence to Support Continued Removal

Mother argues that her history of mental health and alcohol issues, in and of itself, was not an adequate basis for continuing Minors' placement out of Mother's custody at the disposition stage, and that it was a matter of mere speculation that these issues created a risk of harm to Minors. Mother relies primarily on *Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067 (*Kimberly R.*), which held that "[h]arm to a child cannot be presumed from the mere fact the parent has a mental illness. [Citation.] The question is whether the parent's mental illness and resulting behavior adversely affect the child or jeopardize the child's safety. [Citation.]" (*Id.* at p. 1079.)

In *Kimberly R.*, the minor had not actually suffered any injury in his mother's care. Rather, she was late picking him up from day care one day, and when the minor's aunt brought him to the mother's home, she found the mother groggy and incoherent. The mother tested negative for illegal drugs, however, and provided a credible, innocent explanation for the incident. In addition, the mother had demonstrated to the satisfaction of her treatment providers that she was committed to sobriety, was compliant with her

mental health treatment and medication regimen, and was able to care for the minor. (*Kimberly R.*, *supra*, 96 Cal.App.4th at pp. 1078-1079.) Indeed, in that case the social services agency itself sought to dismiss the petition, and it was the minor's counsel who sought to continue the out-of-home placement. (*Id.* at pp. 1075-1077.)

Here, in contrast, it is undisputed that Baby sustained life-threatening physical injuries while in Mother's care. In addition, there is evidence sufficient to sustain the juvenile court's implied findings that Mother knew or should have known of the abuse; failed to intervene to protect Baby; and failed to obtain medical attention for a significant period of time after the abuse was inflicted. Thus, the existence of a risk to Minors in Mother's care is not based purely on speculation, or on the mere existence of Mother's mental health and alcohol problems.

Mother argues that by the time of the disposition hearing, the issues leading to the initial detention of Minors had been addressed, and the risks to them ameliorated. She points out that during the months between Baby's hospitalization and the disposition hearing, she had obtained stable housing and employment; participated in substance abuse treatment and parenting education; visited her children regularly, and acted appropriately during the visits. In addition, Minors were in no continuing danger from Boyfriend, as Mother had severed her relationship with him, and he was incarcerated.

The juvenile court weighed these facts against Mother's relatively recent alcohol relapse, and her subsequent minimization of it. The court also had before it the social worker's testimony that Mother lacked insight into the degree of her own responsibility for Baby's injuries, and did not appear to fully grasp the purpose of her participation in Baby's therapy appointments. In addition, the social worker opined that Mother needed to maintain a longer period of sustained sobriety before Minors could be returned to her without risking their safety, and that the interruption in Mother's access to treatment shortly before the hearing heightened the risk that mother would have another relapse. The existence of these facts is sufficient to distinguish *Kimberly R.*, *supra*, 96 Cal.App.4th 1067. In short, there is substantial evidence to support the juvenile court in

finding clear and convincing evidence of all of the facts on which it relied in its ruling as to disposition.

Mother also argues that the disposition order erred by placing Baby with Derrick H., and thus depriving Minors of their sibling relationship. In the absence of clear and convincing evidence of detriment to Baby, however, the juvenile court was statutorily *required* to place Baby with his non-offending noncustodial parent, Derrick H. (§ 361.2, subd. (a); see *Isayah C.*, *supra*, 118 Cal.App.4th 684.) No such evidence is present in this record. On the contrary, once Derrick H. learned that Baby was his biological child, he immediately assumed responsibility for him; took steps to develop a parental bond and learn the skills necessary to meet his needs; and participated appropriately in his therapeutic and medical treatment. Derrick H. was able to provide Baby with a suitable home, and had a support system that could assist him in meeting his parental responsibilities. As for the sibling relationship, Baby was a very young infant when he was first separated from Daughter, and Mother has not pointed to any evidence in the record, much less clear and convincing evidence, that Baby and Daughter had a strong enough bond that separating them at the disposition stage of the proceedings would be detrimental to Baby, so as to override Derrick H.'s statutory right to custody. Accordingly, Mother has failed to persuade us the juvenile court erred in placing Minors out of Mother's care.

B. Denial of Reunification Services as to Baby

1. Applicable Law and Standard of Review

The juvenile court denied reunification services to Mother with respect to Baby under section 361.2, subdivision (b)(3). This statute provides that when a dependent child is placed in the physical custody of a non-offending former non-custodial parent, the juvenile court has discretion either to deny or offer reunification services to the parent from whose custody the child was removed. (§ 361.2, subd. (b)(3); *In re Erika W.* (1994) 28 Cal.App.4th 470, 475.)

Thus, the standard of review on a challenge to the court's denial of reunification services to the parent who does not have custody is abuse of discretion, not substantial

evidence. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1179.) As the Department points out, Mother's opening brief is incorrect insofar as it argues otherwise. (*In re Erika W., supra*, 28 Cal.App.4th at pp. 475-476.)

Neither of the cases Mother cites in support of her position is apposite. *In re Gabriel L.* (2009) 172 Cal.App.4th 644, "present[ed] the following issue: If, after a period during which both parents were offered reunification services, the child is then placed with one parent, what is the extent of the court's discretion to decide whether to continue to offer services to the noncustodial parent[?]" (*Id.* at p. 647.) The court held that under section 364, the juvenile court had essentially the same discretion to deny further services to the noncustodial parent as is provided by section 361.2, which is the statute applicable here. (*Id.* at pp. 651-652.)

Contrary to Mother's contention, therefore, *In re Gabriel L., supra*, 172 Cal.App.4th 644, does not stand for the proposition that the noncustodial mother of a dependent child must receive reunification services unless the child has been relinquished, the child is in a guardianship, or section 361.5, subdivision (b) applies. Rather, *In re Gabriel L.* is consistent with the holdings in *In re Erika W., supra*, 28 Cal.App.4th 470, and *In re Nada R., supra*, 89 Cal.App.4th 1166, that when a dependent child is removed from the custody of one parent, but remains or is placed in the custody of the other parent, the juvenile court has discretion regarding whether or not to order reunification services for the parent who does not have custody.

Mother also relies on *L.Z. v. Superior Court* (2010) 188 Cal.App.4th 1285, for the proposition that reunification services should not have been denied to her, because there was not clear and convincing evidence that she either caused Baby's injuries, or knew or should have known about them before Baby's condition deteriorated to an extent requiring hospitalization. But in *L.Z. v. Superior Court*, unlike this case, the dependent minor had been removed from the care of *both* of her parents, and the statutory basis for the denial of reunification services was section 361.5, subdivision (b)(5). That statute " 'permit[s] denial of reunification services to either parent on a showing that a parent or someone known by a parent physically abused a minor. [Citation.]' " (*L.Z. v. Superior*

Court, supra, 188 Cal.App.4th at p. 1292.) The court held that in order to justify a denial of reunification services under section 361.5, subdivision (b)(5), “it was incumbent on the [child welfare agency] to demonstrate that [the minor’s mother] knew or should have known that she had an abused baby. [Citation.]” (*Ibid.*)

The governing statute, here, in contrast, is section 361.2, under which there is no requirement that any particular factual showing be made in order to justify the denial of reunification services. The plain language of section 361.2 gives the juvenile court full discretion over the issue of extending reunification services to the noncustodial parent. Nothing in section 361.2 conditions that discretion in any way on the noncustodial parent’s state of knowledge regarding the events leading to the removal of the minor from his or her custody. Accordingly, *L.Z. v. Superior Court, supra*, 172 Cal.App.4th 644 is distinguishable. We review the juvenile court’s order only for abuse of discretion.

2. Abuse of Discretion

Because Mother’s argument on the denial of services issue is premised on an incorrect assumption as to the applicable standard of review, she has not articulated any grounds upon which we could find the juvenile court’s order to be an abuse of discretion. Nor has our own review of the record revealed any basis for so holding.

The juvenile court carefully considered Mother’s argument that she should continue to receive services as to Baby, and accommodated it in part by granting her the right to visit Baby, and to participate in his treatment appointments. Moreover, as the court pointed out, many of the services to be provided to Mother in support of her reunification with Daughter, such as sobriety support and mental health treatment, will also assist her in developing her ability to parent Baby. For all of these reasons, we are not persuaded that the order denying Mother reunification services as to Baby “exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination. [Citation.]” (*In re Leticia S.* (2001) 92 Cal.App.4th 378, 381, citing *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

III. DISPOSITION

The juvenile court order from which this appeal was taken is AFFIRMED.

RUVOLO, P. J.

We concur:

REARDON, J.

SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.